Filed 3/9/12 P. v. Nakanishi CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RUMIKO NAKANISHI, Defendant and Appellant.	B233259 (Los Angeles County Super. Ct. No. YA034400)

APPEAL from orders of the Los Angeles County Superior Court. Thomas R. Sokolov, Judge. Affirmed.

Keli M. Reynolds for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

The trial court denied a defendant's non-statutory motion to vacate her criminal conviction by plea. We affirm the order.

FACTS

In 1997, the People filed a felony complaint alleging that Rumiko Nakanishi had committed the following offenses: conspiracy to commit kidnapping (count 1; Pen. Code, §§ 182, subd. (a)(1); 207, subd. (a));[1] conspiracy to commit child stealing (count 2; §§ 182, subd. (a)(1); 278); conspiracy to commit child custody deprivation (count 3; §§ 182, subd. (a)(1); 278.5, subd. (a)); residential burglary (count 4; § 459); assault with a stun gun (counts 5-9; § 244.5, subd. (b)); attempted kidnapping (count 9; §§ 664; 207, subd. (a)); attempted child stealing (count 10; §§ 664; 278); and attempted child custody deprivation (count 11; §§ 664; 278.5, subd. (a)).

On October 31, 1997, the case was called for a preliminary hearing. At that time, on the People's motion, the complaint was amended by interlineation to add count 12, assault with a deadly weapon (ADW; § 245, subd. (a)(1)). Nakanishi was then advised of and waived her constitutional trial rights, and pleaded guilty to count 12. The offenses alleged in counts 1 through 11 were dismissed. The trial court sentenced Nakanishi to the middle term of three years in state prison. Execution of sentence was ordered suspended and Nakanishi was placed on formal probation for a period of three years on condition she serve 365 days in county jail. The court further ordered Nakanishi to be released to the District Attorney on November 3, 1997 for evaluation and treatment at Edgement Hospital for a minimum of 30 days and a maximum of 311 days.

Nakanishi thereafter appeared regularly in the trial court for reviews of her progress on probation. In mid-February 1999, the trial court revoked probation for a possible violation; in late February 1999, the court reinstated probation. In September 1999, the court denied Nakanishi's motion to terminate probation. In March 2000, the court continued probation. When the court called Nakanishi's case for further review in May 2000, the court received notice of a new arrest, and ordered the probation officer to

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[1] All section references are to the Penal Code.

calendar a violation hearing or provide information to the court indicating that the violation would be heard with the new matter.[2]

More than 13 years after her conviction, in February 2011, Nakanishi filed a "non-statutory motion" to vacate her 1997 ADW conviction by plea based on a constitutional claim of ineffective assistance of counsel. More specifically, Nakanishi claimed her counsel at her ADW case had failed to research and advise her of the immigration consequences of a guilty plea. In a declaration in support of her motion, Nakanishi stated that upon returning from an overseas visit in June 2009 she was "detained at the airport and sent to deferred inspection, where [she] was served with Notice to Appear charging [her] with deportability due to [her 1997 ADW] conviction." Nakanishi further informed the court that she had completed an evaluation at Edgement Hospital as ordered at the time of her 1997 ADW conviction by plea.

At a hearing on March 29, 2011, the trial court denied Nakanishi's motion to vacate her 1997 ADW conviction by plea. However, the court ordered that the sentence of October 31, 1997 be corrected nunc pro tunc to reflect that her three-year formal probation was conditioned upon her serving 54 days in county jail, with credit for 54 days served, rather than a sentence that she serve 365 days.[3] It was further modified to show

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[2] There are materials in the record, introduced in the trial court by Nakanishi at the time of her motion to vacate her 1997 ADW conviction, which indicate that the 2000 criminal case against Nakanishi involved allegations that she possessed burglar's tools. (§ 466.) Those same materials further indicate that Nakanishi also suffered a prior conviction in 1993 for theft. (§ 484, subd. (a).) The record does not indicate the outcome of the 2000 probation violation matter related to her 1997 ADW conviction; there is an indication in the record that Nakanishi was convicted in October 2000 of the burglar tools charge.

[3] It appears the trial judge might have been attempting to also change the sentence to one where imposition of sentence was suspended, but we cannot be certain. When reimposing sentence, the trial court stated, "[t]he midterm three years state prison suspended. Imposition of sentence is suspended." Had the court sought to suspend imposition of the sentence, no state prison term should have been selected. Had the court wished to impose the three year prison term but hold it in abeyance, the trial court should have said *execution* of sentence is suspended.

that she was released to the District Attorney for evaluation at Edgement Hospital for a minimum of 30 days.

DISCUSSION

I. The Jurisdictional Issue

Nakanishi's first contention on appeal is that the trial court had jurisdiction to rule on her motion to vacate her 1997 ADW conviction by plea based on her claim of ineffective assistance of counsel. In making this argument, Nakanishi proffers that the trial court may have denied her motion because the court erroneously believed that it did not have the judicial power to rule on a non-statutory, constitutionally-based motion to vacate a conviction by plea. In their respondent's brief on appeal, the People do not directly respond to Nakanishi's argument concerning the trial court's determination on the issue of its jurisdiction. Instead, the People argue that Nakanishi's motion in the trial court was procedurally defective and lacked merit. We understand the People to concede that the trial court had jurisdiction to address Nakanishi's motion to vacate her ADW conviction, but denied the motion on non-jurisdictional grounds.

We have reviewed the trial court's comments during the hearing on Nakanishi's motion to vacate her ADW conviction. The record, in our view, demonstrates that the court operated from the assumption that it had jurisdiction to rule on the motion and denied it on non-jurisdictional grounds. The trial court's comments establish that it denied the motion because it found a valid plea agreement had been negotiated in Nakanishi's 1997 case, and that Nakanishi pleaded guilty to ADW in accord with the terms of that agreement. In sum, we agree with Nakanishi that the trial court had jurisdiction to address and rule upon her non-statutory motion to vacate her plea. We think the trial court agreed it had jurisdiction as well. The issue on appeal is whether the trial court, in exercising its jurisdiction, properly denied Nakanishi's motion.

II. The Order Denying the Motion to Vacate

A non-statutory motion to vacate a judgment is the legal equivalent of a petition for writ of error *coram nobis*. (See *People v. Kim* (2009) 45 Cal.4th 1078, 1096 (*Kim*).) At common law, the writ of error *coram nobis* could be employed by a court that gave a judgment to reconsider it and give relief from errors of fact. (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 182, pp. 210-211.) The enactment of the statutory motion for new trial largely replaced the writ of error *coram nobis*, but the writ is still used where errors of fact are discovered after the time for a motion for new trial. (*Id*. at p. 211.) The writ of error *coram nobis* was developed by courts to provide a corrective remedy at a time when there was no right to move for a new trial or to appeal from the judgment. (*Kim*, *supra*, 45 Cal.4th at p. 1091.) The grounds on which relief may be granted via a petition for writ of error *coram nobis* are narrower than on a petition for writ of habeas corpus; the purpose of a writ of error *coram nobis* "'is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court' [Citation.]" (*Kim*, *supra*, 45 Cal.4th at p. 1091.)[4]

The People are correct that the trial court properly denied Nakanishi's motion to vacate (or petition for writ of error *coram nobis*) for the procedural reason that she did not show due diligence. We see no evidence in the record of any conduct by Nakanishi challenging her 1997 ADW conviction by plea until she initiated the current matter by her 2011 motion to vacate her conviction. She was apparently satisfied with the outcome of her 1997 case until immigration problems arose in June 2009. Even then, she waited from June 2009 until February 2011 to bring her motion. This is not a record establishing due diligence.

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[4] Nakanishi's motion to vacate was not made under section 1016.5, subdivision (b), which expressly allows a motion to vacate a judgment for failure to advise the defendant of his or her immigration consequences under certain situations.

Assuming the unexplained delay is ignored, we would find the trial court properly denied Nakanishi's motion because it failed on the merits in that a claim of ineffective assistance of counsel may not be raised by such a vehicle. As the Supreme Court explained in *Kim, supra*, 45 Cal.4th 1078, the facts involved in a claim of ineffective assistance of counsel do not go the authority of the court to have rendered the judgment. A presentation of facts which show that a defendant's willingness to enter a plea would have been affected by better legal advice does not constitute a showing of facts that would have prevented rendition of the judgment. (*Id*. at p. 1103.)

To avoid this conclusion, Nakanishi's arguments seem to suggest that her 2011 motion to vacate her 1997 ADW conviction by plea properly raised claims beyond those which would ordinarily be cognizable in the context of a petition for writ of error *coram nobis* or its equivalent. In other words, she essentially argues her 2011 motion to vacate should be considered as an independently standing and procedurally proper vehicle for raising a claim of ineffective assistance of counsel. She cites *People v. Fosselman* (1983) 33 Cal.3d 572 (*Fosselman*). We are not persuaded by Nakanishi's argument.

In *Fosselman*, a trial court expressed concern after a jury trial that the defendant's counsel may have been inadequate, but concluded that it lacked the statutory authority to order a new trial on that basis. On appeal, the Supreme Court framed the issue presented in the following terms: "whether the trial court erred in declining to consider the motion for new trial on the ground of ineffective assistance of counsel." (*Fosselman, supra*, 33 Cal.3d at p. 582.) The court answered this question for these reasons:

"Penal Code section 1181 enumerates nine grounds for ordering a new trial. It is true the section expressly limits the grant of a new trial to only the listed grounds, and ineffective assistance is not among them. Nevertheless, the statute should not be read to limit the constitutional duty of trial courts to ensure that defendants be accorded due process of law. . . . The Legislature has no power, of course, to limit this constitutional obligation by statute. [Citation.] *It is undeniable that trial judges are particularly well suited to observe courtroom performance and to rule on the adequacy of counsel in criminal cases tried before them*. [Citation.] Thus, *in appropriate circumstances justice*

will be expedited by avoiding appellate review, or habeas corpus proceedings, in favor of presenting the issue of counsel's effectiveness to the trial court as the basis of a motion for new trial. If the court is able *to determine the effectiveness issue on such motion,* it should do so. . . ." (*Fosselman, supra,* 33 Cal.3d at pp. 582-583, italics added.)

Nakanishi's current motion to vacate does not fit the situational-specific context for a *Fosselman*-like motion. Nakanishi's claim of ineffective assistance of counsel does not arise in a context in which the trial court observed counsel's performance during the course of a jury trial. Her claim is that, in receiving advice from her counsel, she did not get adequate advice. In sum, her claim is based on a factual showing akin to a petition for habeas corpus.[5]

As did the Supreme Court in *Kim, supra,* 45 Cal.4th 1078, we acknowledge that Nakanishi faces the "harsh consequence" of possible deportation flowing from her 1997 ADW conviction (*id* at pp. 1108-1109). We nevertheless conclude, as in *Kim*, that she is barred from obtaining relief from her conviction at this late date. (*Ibid*.) The United States Congress has plenary power over matters of immigration and naturalization, including deportation (*ibid*.), and appears to have determined that a person such as Nakanishi, with an ADW conviction, is subject to possible deportation. That Nakanishi faces federal immigration issues is not reason for our court to find the *Fosselman* motion procedure fits Nakanishi's current situation in order to present a claim of ineffective of counsel in a 13-year-old case.

Finally, we note the record directly contradicts Nakanishi's claim and clearly demonstrates that she was advised of the immigration consequences of her plea. Indeed, in a written waiver of rights form she personally signed, she placed her initials next to the statement: "I understand that if I am not a citizen of the United States, the conviction for the offense charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." Nakanishi also placed her initials next to this statement: "I have personally initialed each

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[5] Nakanishi could not bring a petition for habeas corpus because she does not allege she is custody of any state official. (*Kim, supra,* 45 Cal.4th at p. 1108.)

of the above boxes and discussed them with my attorney. I understand each and every one of the rights outlined above and I hereby waive and give up each of them in order to enter my plea to the above charges." Her attorney also signed and initialed a statement he had discussed each of the rights in the waiver form with Nakanishi.

DISPOSITION

The trial court's order dated March 29, 2011, denying the non-statutory motion to vacate judgment, is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.